

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 8th day of October, two thousand nine.

PRESENT: DENNIS JACOBS,
 Chief Judge,
ROSEMARY S. POOLER,
BARRINGTON D. PARKER,
 Circuit Judges.

- - - - -X
Joseph Frazier, also known as
Smokin` Joe,

Plaintiff-Appellant,

Rubin Mark, Inc.,

Plaintiff,

V.

Edward Brophy, acting individually
as a Boxing Promoter in connection
with Turning Stone Casino and as a

1 representative of the International
2 Boxing Hall of Fame, also known as
3 Edward Brofy, International Boxing
4 Hall of Fame, an off-reservation
5 entity, controlled by Edward Brophy,
6 Turner Stone Casino, Oneida Indian
7 Nation, Ray Halbritter, as an
8 individual and a representative of
9 the Oneida Indian Nation, Dwayne
10 Stitzer, as an Individual and
11 Marketing Manager, Turner Stone
12 Casino, also known as Dwayne
13 Stitzer,
14

15 Defendants-Appellees.
16

17 - - - - -X
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19 **APPEARING FOR APPELLANT:** H. TODD BULLARD, Esq., A.
20 VINCENT BUZARD, Esq. Harris
21 Beach PLLC, Pittsford, New York,
22 New York.
23

24 **APPEARING FOR APPELLEES:** MICHAEL R. SMITH, DAVID A.
25 REISER, JANE M. RICCI, Zuckerman
26 Spaeder LLP, Washington, D.C.;
27 PETER D. CARMEN, MEGHAN MURPHY
28 BEAKMAN, Oneida Nation Legal
29 Department, Verona, New York;
30 TIMOTHY P. MURPHY, ASHLEY D.
31 HAYES, Hancock & Estabrook,
32 Syracuse, New York.
33

34 Appeal from orders of the District Court for the
35 Northern District of New York (Scullin, J.).
36

37 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
38 **AND DECREED** that the case be **REMANDED** to district court with
39 orders to **DISMISS** for lack of subject matter jurisdiction.
40

41 Plaintiff Joe Frazier appeals from orders of the
42 District Court for the Northern District of New York
43 (Scullin, J.) dismissing claims against certain defendants-
44 appellees and granting summary judgment in favor of other
45 defendants-appellees. We assume the parties' familiarity

1 with the underlying facts, the procedural history, and the
2 issues presented for review.
3

4 The district court correctly ruled that it lacked
5 subject matter jurisdiction to hear this case on either
6 federal question or diversity grounds. Frazier v. Turning
7 Stone Casino, 254 F. Supp. 2d 295, 302-05 (N.D.N.Y. 2003).
8 Out of an excess of caution, the district court went on to
9 rule on the merits of the case.
10

11 An Indian Tribe is not a citizen of any state for the
12 purposes of diversity jurisdiction. Romanella v. Hayward,
13 114 F.3d 15, 16 (2d Cir. 1997); Frazier, 254 F. Supp. 2d at
14 304. ("[T]he Court cannot assert diversity jurisdiction over
15 this action as long as the Oneida Indian Nation ("Oneida
16 Nation") and the Casino are Defendants."). Because an
17 Indian Tribe is not a citizen of any state, the Oneida
18 Nation's presence as a party bars a federal court from
19 hearing the matter under its diversity jurisdiction.
20 Romanella, 114 F.3d at 16 ("[T]he diversity statute's
21 provisions for suits between citizens of different states,
22 28 U.S.C. § 1332(a), strictly construed, cannot be said to
23 embrace suits involving Indian tribes."); see also
24 Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 829
25 (1989) (holding that one stateless party destroys diversity
26 jurisdiction). This accords with the treatment of other
27 domestic sovereigns, such as states, which cannot sue or be
28 sued in diversity. Romanella, 114 F.3d at 16. Given the
29 continued presence of the Oneida Nation in this suit, the
30 district court lacked subject matter jurisdiction to hear
31 this case. We therefore remand with instructions to dismiss
32 the matter.
33

34 Federal Rule of Civil Procedure 21 allows for a court
35 at any stage of a litigation, including a court of appeals
36 on its own authority, to dismiss parties in order to retain
37 diversity jurisdiction. Fed. R. Civ. P. 21 ("Misjoinder of
38 parties is not a ground for dismissing an action. On motion
39 or on its own, the court may at any time, on just terms, add
40 or drop a party."). Nothing in this provision mandates that
41 a court of appeals take action and neither party has moved
42 for us to do so. We decline to exercise this power here to
43 salvage jurisdiction.

* Frazier does not appeal that this court lacks federal
question jurisdiction.

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2 The dismissal of this suit from federal court does not
3 foreclose all relief against the tribe, its casino, and its
4 agents. The Oneida Nation has a trial and appellate court
5 system staffed by former New York Court of Appeals Judges
6 Stewart Hancock and Richard Simons. FACT SHEET: The Oneida
7 Nation Court,
8 [http://www.oneidaindiannation.com/pressroom/factsheets/26965](http://www.oneidaindiannation.com/pressroom/factsheets/26965674.html)
9 [674.html](http://www.oneidaindiannation.com/pressroom/factsheets/26965674.html) (last visited October 2, 2009). To the extent
10 Frazier has live claims against the tribe, its casino, or
11 the casino's employees, he could attempt to bring them
12 there.
13
14

15 FOR THE COURT:
16 CATHERINE O'HAGAN WOLFE, CLERK
17
18

19 By: _____